Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-1366

ST. PAUL MERCURY INSURANCE COMPANY,
INDEMNITY MARINE ASSURANCE CO., LTD.,
AND AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioners,

VS.

EAST WEST TOWING, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THEODORE GEORGE DIMITRY
HAROLD KEMLER WATSON
VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2296

Counsel for Petitioners

March, 1980

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ST. PAUL MERCURY INSURANCE COMPANY,
INDEMNITY MARINE ASSURANCE CO., LTD.,
AND AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioners,

VS.

EAST WEST TOWING, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, St. Paul Mercury Insurance Company, Indemnity Marine Assurance Co., Ltd., and American Motorists Insurance Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 12, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears in the Appendix hereto. Petitioners' Petition for Rehearing was denied on January 18, 1980. The order denying said petition has not been reported or furnished to counsel, but the notice to counsel informing them of this

order appears in the Appendix hereto. The opinion rendered by the district court, styled "S. C. Loveland, Inc. v. East West Towing, Inc., etc.," was reported at 415 F. Supp. 596 (S. D. Fla. 1976) and is also appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 12, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 18, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case transferred pursuant to 28 U.S.C. § 1404, application of the conflict of laws rules of the transferee state rather than that of the transferor state conflicts with the decision of this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964).

2. Whether state conflict of laws or federal admiralty conflicts rules govern the choice-of-law issues in a controversy arising out of a contract of marine insurance.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1404(a)

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

This case arises out of a dispute involving a contract of marine insurance. Petitioners, St. Paul Mercury Insurance Company, Indemnity Marine Assurance Co., Ltd., and

American Motorists Insurance Company [hereinafter "Petitioners"], were the underwriters at risk on a "Tug Syndicate" form policy of marine insurance issued in New Orleans, Louisiana, to East West Towing, Inc. [hereinafter "East West"], a Louisiana corporation. The policy was issued to insure East West in its capacity as owner of the Tug MISS CAROLYN against certain liabilities arising out of the tug's operation. The policy contained a warranty of continuing ownership usually found in such policies:

> This insurance shall be void in case this policy or the vessel named herein, shall be sold, assigned, transferred or pledged, or if there be any change of management or charter of the vessel, without the previous consent in writing of this Company.

On August 14, 1973, the MISS CAROLYN departed New Orleans with the Barge LOVELAND 34, owned by S. C. Loveland, Inc. [hereinafter "Loveland"] in tow, bound for Jacksonville, Florida. On August 16, 1973, a Louisiana notarial Bill of Sale was executed in New Orleans, purporting to transfer the ownership of the MISS CAROLYN from East West to E. & I., Inc. [hereinafter "E. & I."], a Florida corporation. At that time the tug and barge were in Panama City, Florida. While in Panama City, a new Captain employed by E. & I. boarded the MISS CAROLYN, and the flotilla of tug and barge with employees of both East West and E. & I. aboard proceeded to Tampa, Florida. On arrival in Tampa on August 18, 1973, the barge was anchored near the Sunshine Skyway Bridge, owned by the State of Florida [hereinafter "Florida"], and the MISS CAROLYN proceeded into Tampa harbor where East West's crew disembarked to return to Louisiana. At that time it was anticipated that another tug sent by East West, the M/V GARY STEPHENS, would arrive shortly and take the LOVELAND 34 in tow to complete the journey to

Jacksonville, Florida. Before the GARY STEPHENS arrived, however, successive daily thunderstorms caused the barge to drag anchor on August 19 and 20 and ultimately collide with the bridge, causing damage to the bridge and barge on August 20 — four days after execution of the Bill of Sale.

Thereafter the following lawsuits were filed invoking admiralty jurisdiction pursuant to 28 U.S.C. § 1333:

1. Loveland filed suit in the Southern District of Florida against East West and E. & I. *in personam,* and the MISS CAROLYIN *in rem* for damages to the LOVELAND 34;

2. Florida, through its Department of Transportation, filed suit in the Southern District of Florida against Loveland and East West *in personam* and the MISS CAROLYN and the LOVELAND 34 *in rem.*

3. Petitioners filed suit in the United States District Court for the Eastern District of Louisiana against East West, seeking a declaratory judgment that the policy of insurance was null and void, alleging that the warranty of continuing ownership and management of the vessel had been breached by the August 16 sale to E. &. I.

Choice-of-law issues were important in all three actions, but for different reasons. In the first two, between the Louisiana seller (East West) and Florida purchaser (E. & I.), it was important to determine what law governed the issue of when sale of the vessel was complete, since this had bearing upon who was responsible for the decision to anchor the barge. However, in the suit for declaratory judgment filed in Louisiana by Petitioners against their Louisiana assured (East West), it was crucial to determine what law governed the issue of whether the insurance policy warranty against sale of the vessel was breached. Under Louisiana law, transfer of title is complete upon an

agreement for the object and its price, without delivery of the thing sold.[1] Florida law requires delivery for a change of ownership.

Over the opposition of Petitioners, the declaratory judgment action was transferred to the Southern District of Florida and was consolidated for all purposes with the other two suits. After a trial on the merits before The Honorable Norman C. Roettger, Jr., the court held that Florida law of sales determined whether a transfer of ownership of the tug to E. & I. had occurred. Since the court found that "delivery" as required by Florida law had not taken place until after the tug anchored its barge in Tampa Bay, the court held that East West was still responsible for the torts of the insured tug and its crew. The court went on to hold that the anchoring of the barge in Tampa Bay constituted negligence on the part of East West's employees, and that East West and Petitioners, as East West's insurers, were liable to Loveland and to Florida for the damages to the LOVELAND 34 and the bridge.

The district court made no distinction between the law applicable to the contract for the sale of the tug and that

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[1] Article 2456 of the Louisiana Civil Code provides:

> The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid.

The Florida district court held that even under Louisiana civil law, arrangements for delivery constituted a "suspensive condition" delaying the passage of title. 415 F.Supp. at 611. Petitioners attacked this legal conclusion on appeal. The Court of Appeals decided that Florida law was applicable to the sale of the vessel and did not reach Petitioners' argument that the Southern District of Florida had misinterpreted the Louisiana Civil Code. Accordingly, it will be necessary to remand to the Court of Appeals to review the ruling of the trial court in this regard.

applicable to the contract of marine insurance. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In approving the trial court's application of Florida law to both contracts, the court held that

> the district court was not bound to apply the admiralty conflicts rule in this case because a contract for the sale of a ship is not a maritime contract. . . . Hence, the application of Florida law under the circumstances is unfettered by suggestions that admiralty conflicts law would require the application of Louisiana law.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals applied Florida conflict of laws rules in a case initially filed in the Eastern District of Louisiana in direct conflict with this Court's opinion in *Van Dusen* v. *Barrack,* 376 U.S. 612 (1964). Review by this Court is required of this aspect of the decision. Moreover, the Court of Appeals' decision to apply state rather than federal admiralty conflicts rules to a contract of marine insurance is an erroneous and disruptive precedent which requires review by this Court.

(1) The decision below conflicts with the decision of this Court in Van Dusen v. Barrack, 376 U.S. 612 (1964).

Petitioners filed suit in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment that the policy of insurance issued to East West was null and void. While E. & I., Loveland, and Florida intervened in that litigation, Petitioners were not a party to any of the lawsuits originally filed in Florida. If state choice-of-law rules were to be applied in the declaratory judgment action, it is clear that the applicable conflicts rules were those of Louisiana, the situs of the transferor court, and not the conflicts laws of Florida.

In *Van Dusen* v. *Barrack,* 376 U.S. 612 (1964), multiple lawsuits were filed in the United States District Court for the Eastern District of Pennsylvania for damages arising out of the crash of an airplane in Boston Harbor. The defendants moved pursuant to 28 U.S.C. § 1404(a) to transfer these actions to the District of Massachusetts. In arguing against transfer, the plaintiff's chief argument was "that Pennsylvania choice-of-law rules would result in the application of laws substantially different from those that would be applied by courts sitting in Massachusetts." *Id.* at 626. The holding of this Court was quite clear:

> [T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.

Id. at 639. Since the principal issue raised was whether conflicts law of the transferor or transferee state was to be applied, this Court's opinion obviously requires application of the choice-of-law rules of the state where the litigation initially was instituted.

The instant case could scarcely be more similar. Here, Petitioners filed suit in the Eastern District of Louisiana alleging that the policy of insurance was voided by the sale of the MISS CAROLYN. The principal issue involved was one of choice of law: if the marine insurance contract was to be construed in light of Florida law, the policy was in effect; if by Louisiana law, the policy was void. In view of the conflict of laws issues presented, the Court of Appeals first had to decide whether state or federal conflicts rules applied. Since it decided that state conflicts law applied, it had to decide whether Louisiana or Florida choice-of-law principles were applicable. However, the court did not even discuss how Louisiana courts would resolve the conflict of laws issue. Accordingly, the language of the opinion stating that "the application of Florida law under the

circumstances is unfettered by suggestions that admiralty conflicts law would require the application of Louisiana law" clearly indicates that the court felt the whole law of Florida was applicable, including its conflicts principles, without regard to Louisiana choice-of-law rules. To reach this conclusion that Florida conflicts rules applied, the court had to completely disregard the fact that the litigation initially was instituted in Louisiana. Accordingly, the decision of the Court of Appeals to apply Florida law is in direct conflict with this Court's *Van Dusen* decision.

(2) The issue of whether state or federal conflict of laws rules govern a dispute arising out of a contract of marine insurance is an important issue of federal law which has not been, but should be, settled by this Court.

In its opinion, the United States Court of Appeals for the Fifth Circuit recognized that "[t]hese three admiralty cases revolve, to a large extent, around questions of insurance coverage." When it came to resolving those questions, however, it stated that

> the application of Florida law under the circumstances is unfettered by suggestions that admiralty conflicts law would require the application of Louisiana law.

The decision below applying state conflicts rules to a contract of marine insurance raises serious and recurring questions about the extent of the applicability of state law in marine insurance disputes and has great potential for disrupting the uniformity of the maritime law.

The dispute between Petitioners and their assured involves title to a vessel only insofar as necessary to determine whether a breach of the marine insurance policy warranty against change of ownership occurred. The policy of marine insurance was unquestionably a maritime contract governed in part by federal maritime law. *Insurance*

Co. v. *Dunham,* 78 U.S. (11 Wall.) 1 (1871). Thus, to say that state conflicts rules must govern because a contract of sale of a vessel is a non-maritime contract ignores the real issue between Petitioners and their assured. That issue was what law should be applied to interpret what the parties to the contract of insurance meant by the wording of the insurance policy — not whether some state could appropriately place certain conditions upon the contract for the transfer of title to a vessel. With the issue thus properly stated, Petitioners respectfully submit that the decision of the Court of Appeals raises important and recurring issues concerning the applicability of state law in marine insurance disputes.

In *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955), this Court held that state law governed at least some aspects of marine insurance disputes. Since that decision, virtually every question pertaining to a policy of marine insurance raises the initial problem of determining whether state or federal law is to govern the particular issue at hand. This initial determination has been called a "troublesome question." *Kalmbach, Inc.* v. *Ins. Co. of State of Pennsylvania,* 529 F.2d 552, 554 (9th Cir. 1976). *Compare Irwin* v. *Eagle Star Insurance Co.,* 455 F.2d 827 (5th Cir. 1972), *cert. denied,* 409 U.S. 852 (1972), *with Fireman's Fund Insurance Co.* v. *Wilburn Boat Co.,* 300 F.2d 631, 647, n. 12 (5th Cir. 1962). But at least the search for applicable law has been given some guidance by the presence of one fixed star on the horizon. Once the decision to apply state law has been made, the courts have uniformly held that federal conflicts principles determined which state's law was applicable. *J. Ray McDermott & Co.* v. *Fidelity & Casualty Co. of New York,* 466 F.Supp. 353 (E.D. La. 1979); *Ahmed* v. *American Steamship Owners Mutual Protection and Indemnity Ass'n,* 444 F.Supp. 569 (N.D. Cal. 1978); *Navegacion Goya, S.A.* v. *Mutual Boiler & Machinery Insurance*

Co., 1972 A.M.C. 650 (S.D. N.Y. 1972). *See also Eagle Leasing Corp.* v. *Hartford Fire Insurance Co.*, 540 F.2d 1257 (5th Cir. 1976) (court fashioned conflict of laws rules of its own without reference to state law).

This approach in marine insurance controversies is consistent with the approach taken in other maritime cases. In other disputes within the admiralty jurisdiction where reference to state law is required, the courts have uniformly held that federal conflict of laws rules determine whether the law of state "A" or state "B" should apply. *Atlantic Lines, Ltd.* v. *Narwhal, Ltd.*, 514 F.2d 726 (5th Cir. 1975); *Scott* v. *Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1968); *Harris* v. *United Air Lines, Inc.*, 275 F.Supp. 431 (S.D. Iowa 1967). This Court has on various occasions fashioned federal maritime conflicts rules "intended to guide courts in the application of maritime law generally." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 1959; *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). These decisions formulate principles which conflict directly with the rule of *lex rei sitae* applied by the Court of Appeals. By applying state conflicts rules to a dispute over a contract of marine insurance, the Court of Appeals for the Fifth Circuit has introduced a chaotic and novel element into the determination of the applicable law in maritime disputes.

The maritime industry by its very nature gives rise daily to transactions and occurrences which have significant relationships with many states. In our federal system, the maritime law that governs those transactions is drawn from both state and federal, and, at times, foreign sources. State law has been held to govern some aspects of marine pollution disputes, *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973); to determine whether a "definite sale" had occurred within the meaning of a charter party, *Atlantic Lines, Ltd.* v. *Narwhal, Ltd.*, 514 F.2d

726 (5th Cir. 1975); to determine the liability of parties to a shipboard altercation, *Baggett* v. *Richardson*, 473 F.2d 863 (5th Cir. 1973); to determine whether a person is a "child" of a decedent for purposes of wrongful death recovery under the Jones Act, *Murphy* v. *Houma Well Service*, 409 F.2d 804 (5th Cir. 1969); and to provide recovery for a decedent's pain and suffering, *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971). Accordingly, it is obvious that the question of whether state or federal conflicts rules apply to determine the applicable state law in maritime disputes is of extreme importance to the maritime industry. It is submitted that this Court should review the decision of the Court of Appeals and speak authoritatively to this issue.

This case is proof of the validity of the old adage that hard cases make bad law. The complex issues involved from inception have resulted in a confused appellate opinion which, if left undisturbed, will be misconstrued and misleading until eventually reviewed in another case.

CONCLUSION

For the reasons assigned, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THEODORE GEORGE DIMITRY,
HAROLD KEMLER WATSON
VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2296

Counsel for Petitioners

APPENDIX A

S. C. LOVELAND, INC.
Plaintiff-Appellee, Cross-Appellant,

v.

EAST WEST TOWING, INC.,
Defendant, Cross-Appellee,

E. & I., Inc., IN PERSONAM, and the TUG MISS CAROLYN, etc.,
IN REM, *Defendants-Appellants, Cross-Appellees.*

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,
Plaintiff-Appellant,

v.

S. C. LOVELAND, INC., et al.,
Defendants-Appellees.

ST. PAUL MERCURY INSURANCE COMPANY et al.,
Plaintiffs-Appellants,

v.

EAST WEST TOWING, INC.,
Defendant-Appellee.

No. 76-4447.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Dec. 12, 1979.

Appeals from the United States District Court for the Southern District of Florida.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

These three admiralty cases revolve, to a large extent, around questions of insurance coverage. The occurrences giving rise to these cases are complex and, at first glance,

confusing, but the district judge did an admirable job of setting out the facts in his opinion at 415 F.Supp. 596 (S.D. Fla. 1976). The district court's conclusions of law, for the most part, also comport with our conclusions. We therefore adopt Judge Roettger's opinion as our opinion on appeal, with one modification.

A brief restatement of the key facts and issues will be helpful in understanding our disposition of these appeals. On August 20, 1973, the barge LOVELAND 34, owned by S. C. Loveland, Inc., [sic] (Loveland) dragged anchor and crashed into the Sunshine Skyway Bridge, owned by the State of Florida. Two days earlier employees of East West Towing, Inc. (East West) had anchored the barge in spoil banks in close proximity to the bridge and left it there unattended. On August 19, during a thunderstorm, the barge dragged anchor and drifted closer to the bridge and the bridge's owner, the State of Florida, called the Coast Guard. On August 20, the bridge tender twice called the bridge foreman for the State of Florida Department of Transportation who twice notified the Coast Guard that the barge was drifting dangerously close to the bridge. Shortly thereafter during a rain squall the barge collided with the bridge causing damage to the bridge and barge. The bridge employees had been watching the barge with binoculars and could identify it. A ship and at least one barge had previously hit the bridge.

The Coast Guard notified Loveland that the barge was against the bridge before hauling it away from the bridge. Loveland called a firm in Tampa and hired a tug which took the barge from the cutter within thirty minutes of receiving the call.

The barge had been towed from New Orleans to Tampa by the tug MISS CAROLYN. When the tug and its tow left New Orleans, the tug was owned by East West Towing,

Inc., but during the course of the tow, while the tug and the barge were in Panama City, Florida, documents of sale of the MISS CAROLYN to E. & I., Inc. (E. & I.) were executed in New Orleans. The MISS CAROLYN was not, however, delivered to E. & I. until after the East West crew had anchored the barge in spoil banks in the mouth of Tampa Bay. Another tug operated by East West, the GARY STEPHENS, was to have relieved the MISS CAROLYN of the completion of the tow of the LOVELAND 34 to Jacksonville, Florida, but before the GARY STEPHENS could locate the barge the collision occurred.

Shortly after the collision, the barge owner, Loveland, sued the tug MISS CAROLYN *in rem* and East West and E. & I. *in personam*. East West and E. & I. cross-claimed against each other for damages resulting from any liability to the plaintiff. In a second suit, the State of Florida sued Loveland and East West *in personam* and the tug MISS CAROLYN and the barge LOVELAND 34 *in rem*. Loveland cross-claimed against East West and the tug MISS CAROLYN. Finally, St. Paul Mercury Insurance Company (St. Paul) sought a declaratory judgment to declare the policy of insurance issued to East West null and void because of East West's alleged change of ownership or management of the vessel without the underwriters' written consent. Loveland and E. & I. intervened, each asserting an interest as a potential beneficiary of the policy.

The three suits were consolidated for purposes of pleading and trial. The trial court ultimately apportioned fault for the collision as follows: 25% to the State of Florida Department of Transportation (as owners of the bridge), 50% to the tug MISS CAROLYN *in rem*, and 25% to East West *in personam* for its own fault as well as that of the tug GARY STEPHENS. With regard to insurance coverage, the trial court found the underwriters liable under

their policy of insurance issued on the tug MISS CAROLYN because first, the negligent acts of the MISS CAROLYN occurred prior to the time that a change in management and ownership occurred, and second, there was written assent to the change in ownership by virtue of two endorsements issued after the collision and after the change in ownership.

The district court's discussion of the time when a change in interest or ownership in the tug MISS CAROLYN occurred relative to the occurrence of the negligent acts for which the tug MISS CAROLYN is liable *in rem* is substantially correct. *See S. C. Loveland, Inc.* v. *East West Towing, Inc.*, 415 F.Supp. 596, 609-12. Indeed, the comments we add do not change the result reached by the district court. As the district court noted, the critical question is whether to apply the law of Louisiana or Florida, for the Civil Code of Louisiana may not require delivery as a condition of passage of title while Florida's Uniform Commercial Code requires delivery to the purchaser in order for title to pass. The district court ultimately applied Florida law, concluding that in determining the validity and effect of a transfer of title in personalty, the universally recognized conflicts law is that *lex rei sitae* or the law of the place of the situs of the personalty governs. While we agree with the district court's analysis and application of Florida law, we note that the district court initiated its discussion by stating "in questions involving contract interpretation, admiralty conflicts law recognizes the principle of *lex loci contractus;* that is the law of the place where the contract is made." *Id.* at 610. While that is a correct rule of conflicts in the case of maritime contract, the district court was not bound to apply the admiralty conflicts rule in this case because a contract for the sale of a ship is not a maritime contract. *Atlantic Lines, Ltd.* v. *Narwhal, Ltd.*, 514 F.2d 726, 731 (5th Cir. 1975); *Richard Bertram & Co.* v. *The Yacht,*

Wanda, 447 F.2d 966, 967 (5th Cir. 1971); *The Ada,* 250 F.2d 194, 195 (2d Cir. 1918); *Camper and Nicholsons, Ltd.* v. *The Yacht "Fontainebleau II",* 292 F.Supp. 734, 735 (S.D.Fla.1968); *Grand Banks Fishing Co. v. Styron,* 114 F.Supp. 1 (D.Me.1953). Hence, the application of Florida law under the circumstances is unfettered by suggestions that admiralty conflicts law would require the application of Louisiana law. We find the district court's decision to apply Florida law in determining the time of the passage of title to the tug MISS CAROLYN firmly grounded in reason and authority, and we therefore affirm the court's holding East West liable *in personam* for its negligence in leaving the barge unattended in an exposed area in close proximity to the bridge, improperly anchoring the barge in a spoil bank, failing to safeguard the anchored barge, failing to inform the barge's owners of the change in circumstances, and failing to obtain a relief tug. We also affirm the court's holding the underwriters liable under their policy of insurance issued on the tug MISS CAROLYN. The finding that the tug GARY STEPHENS was negligent in failing to pick up the unattended barge promptly and failing to come to the aid of the barge before it dragged anchor was likewise correct.

The district court held that negligence of the State of Florida Department of Transportation was also a proximate cause of the collision and resulting damages. Following the rule adopted in *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), the court allocated damages among the parties "proportionately to the comparative degree of their fault," *id.* at 411, 95 S.Ct. at 1716, 44 L.Ed.2d at 262, and apportioned twenty-five percent of the fault in the collision to the State of Florida Department of Transportation. The court found that the state's negligence consisted of its agents [sic] failure to do no more to prevent the drifting barge from

colliding with the bridge than to contact the Coast Guard. The court found that afternoon thundershowers in the area in August are a common and foreseeable occurrence and that squalls in fact occurred on both the afternoons of August 19th and 20th. Thus the possibility of a collision was foreseeable to the agents of the state watching the barge drift toward the bridge, particularly in view of prior collisions of a ship and at least one other barge with the bridge. Specifically, the state made no efforts to determine the ownership of the barge and contact its owner although the employees could identify the barge. At the time the owner was frantically trying to locate the barge and he acted promptly after learning its whereabouts, thus indicating that he would have taken the necessary steps to have the barge taken under tow. Also the state made no effort to summon any of the many tugs in the area to come to the assistance of the apparently abandoned barge. The quick response of the tug later hired by the owner indicated that this course of action would have prevented the collision. The court noted that this action might have involved some expense to the state[1] but that, more important, it would have prevented damage to the state. Instead, according to the court, the state did nothing more than call the Coast Guard and watch the barge drift into the side of its bridge.

The State of Florida Department of Transportation has appealed from the trial court's holding the state negligent and therefore liable for a portion of the damage to its bridge arguing: if the state had any duty to act in these circumstances, it owed that duty to the people of Florida and not to the barge owner; by calling the Coast Guard the state acted reasonably and discharged any duty to act; courts have found bridge owners negligent in the operation of

[1] The Court added, however, that a tug that towed or secured this barge would have had a lien on the barge, thus the state would be free of such expense.

bridges but not for failure to manage drifting vessels owned by others.[2]

The admiralty and maritime jurisdiction of the United States extends to cases of damage to property on land caused by a vessel in navigable waters, 46 U.S.C.A. § 740, and the admiralty rule adopted in *Reliable Transfer* requires allocation of damage liability proportionate to the relative fault of each party, but admiralty law itself does not always supply the standard of conduct to be applied in a maritime case. If a situation is not governed by statute, rules made under the authority of a statute, or maritime custom, then conduct is judged according to principles of tort law, especially of negligence.[3]

Florida made a claim against the other parties in this case for damages to its bridge; the barge owner made no claim against the state for damage to its barge. The district court essentially found the state guilty of contributory

[2] We have examined the state's other arguments and find them without merit.

[3] *Pennsylvania Railroad Company* v. *S. S. Marie Leonhardt*, 202 F.Supp. 368, 375 (E.D.Pa. 1962), *aff'd* 320 F.2d 262 (3d Cir. 1963); G. Gilmore and C. Black, *The Law of Admiralty* 398-402, 420 (1957); J. Griffin, *The American Law of Collision* § 204 (1949). It is true that certain maritime law principles are sometimes helpful in deciding cases of collisions with bridges; bridges are obstructions to navigation and the right of navigation is paramount, land traffic is subservient, *Pennsylvania Railroad Co.* v. *S. S. Marie Leonhardt*, 202 F.Supp. 368, 376 (E.D.Pa. 1962), *aff'd* 320 F.2d 262 (3d Cir. 1963); any presumption that a moving vessel colliding with a fixed portion of a bridge is negligent disappears when evidence is presented, *Pennsylvania Railroad Co.* v. *S. S. Marie Leonhardt*, 320 F.2d 262, 264 (3d Cir. 1963). In the present case, however, the negligence of those responsible for the drifting barge is clear and it does not appear that the district court based its finding of the state's negligence on the former presumption.

negligence[4] which in admiralty law operates as comparative negligence.[5] A plaintiff is contributorily negligent when his conduct falls below the standard to which he is required to conform for his own protection.[6] The standard is that of a reasonable person under like circumstances.[7] Plaintiff's negligence is "disregard for his own safety and not necessarily such as threatens to invade any of defendant's legal rights." *Nesbit* v. *Everette,* 243 F.2d 59 (5th Cir. 1957). Contributory negligence does not involve breach of any duty owed others[8] but, rather, a failure reasonably to safeguard one's own person or property. *Failure to act* as one should may constitute contributory negligence. *Neal* v. *Saga Shipping Co., S.A.,* 407 F.2d 481 (5th Cir. 1969), *cert. denied,* 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed.2d 775 (1968), *rehearing denied,* 396 U.S. 871, 90 S.Ct. 45, 24 L.Ed.2d 129 (1968). The district court found that the state breached its duty to exercise reasonable care and take reasonable

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[4] "The State of Florida, Department of Transportation has a duty to exercise reasonable care and take reasonable precautions for the safety and protection of its own property. The court finds that the State of Florida, through its agents, breached this duty and is therefore negligent." 415 F.Supp. at 606.

[5] *See United States* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 251 (1975). Prior to this decision, admiralty law in the United States required an equal division of damages among those guilty of contributory fault. (Other maritime nations adopted the rule of divided damages earlier.) Contributory fault has never barred plaintiff's claim in admiralty. According to Griffin, admiralty courts have been more willing to find contributory fault than have common law courts where such fault acts as total bar. J. Griffin, *supra* note 3, at § 216.

[6] Restatement (Second) of Torts § 463 (1965); W. Prosser, *The Law of Torts* 416 (4th ed. 1971).

[7] Restatement (Second) of Torts § 464 (1965); W. Prosser, *supra* note 6, at 419.

[8] Restatement (Second) of Torts § 463, Comment b (1965); W. Prosser, *supra* note 6, at 418; James, *Contributory Negligence,* 62 Yale L.J. 691, 723 (1953).

precautions for the safety and protection of its own property and was therefore negligent, and that this negligence was a proximate cause of the collision and damages. Questions of contributory negligence and proximate cause are fact questions, *Safe Harbor Enterprises, Inc.* v. *Hill,* 301 F.2d 139, 139 (5th Cir. 1962), and findings of fact of the trial court in admiralty are binding on us unless clearly erroneous. *Movible Offshore, Inc.* v. *M/V Wilken A. Falgout,* 471 F.2d 268, 271-72 (5th Cir. 1973); *Horton & Horton, Inc.* v. *T/S J. E. Dyer,* 428 F.2d 1131, 1135 (5th Cir. 1970), *cert. denied sub nom. Horton* v. *Horton, Inc.* v. *Vaughan Marine, Inc.,* 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed.2d 441 (1971); *Sisung* v. *Tiger Pass Shipyard Co.,* 303 F.2d 318, 322 (5th Cir. 1962), *Safe Harbor Enterprises, Inc.* v. *Hill,* 301 F.2d 139, 139 (5th Cir. 1962).

We thus reject the state's argument that it breached no duty to those who owned or were responsible for the barge. Contributory negligence resulting in a diminution of damages otherwise recoverable may exist even though there be no breach of a duty to another. Stated another way, one may be guilty of negligence in the care of one's own property and thus suffer a reduction of recoverable damages, even though such negligence would not be actionable in a claim by another. We also decline to accept the state's characterization of its activities in the circumstances as "reasonable" in view of the district court's finding to the contrary. We find the state's argument that it did all it reasonably could be expected to do by repeatedly notifying the Coast Guard, the agency responsible for floating dangers to navigation, forceful. This argument, however, was addressed to the finder of fact and we cannot say that the district judge lacked sufficient evidence to find the state negligent. The question is not whether we would have found otherwise but, rather, "whether the trial court could per-

missibly find as it did." *Movible Offshore, Inc.* v. *M/V Wilken Falgout,* 471 F.2d 268, 271 (5th Cir. 1973).

We now turn to the state's contention that *as a matter of law* it cannot be found negligent for failing to manage the drifting barge. It is true that the negligence of bridge owners is typically based on acts or omissions more closely related to bridges themselves — improper construction, failure to lift a draw, or improper communication of a bridge tender with a vessel. In *United States* v. *Barge CBC,* 233 F.Supp. 85 (E.D.La. 1964), the owner of a pontoon bridge brought an action against a barge and its owner for damage caused by collision. The barge became unmoored during heavy rains, collided with the bridge, and eventually broke through the bridge. The barge owner asserted that the bridge owner was contributorily negligent in failing to attempt to remove or secure the barge before its breakthrough. The court held that the barge owner failed to meet its burden of proof; it failed to offer evidence that equipment was available to the bridge owner to secure the barge in time, and the bridge owner showed that removal in time was not feasible due to an obstruction and to insufficient traction for its equipment. *Id.* at 88. In that case the defendant asserted that the plaintiff was negligent after the collision while in the present case plaintiff was found negligent for not preventing the collision. Both cases, however, involve failure to secure or remove a drifting vessel, and the court in *Barge CBC* at least implied that failure to secure or remove, if feasible, would constitute contributory negligence.

We do not base our resolution of what may well be an issue of first impression in admiralty law on the absence of cases finding negligence in fact patterns identical to those in the instant case. Rather, because no statute, regulation, or maritime custom controls, we again turn to com-

mon law, specifically the law of nuisance as related to contributory negligence and the rules of damages involving avoidable consequences.

It appears that the only modification of the reasonable person standard that might support the state's contentions in the present case is found in the law of nuisance. Further, many of the better discussions of the nature of the duty of one threatened with injury to his property are found in nuisance cases, and where a nuisance is itself caused by negligence, analysis of nuisance is so similar to analysis of other torts as to be almost undistinguishable. Thus, we may safely look to nuisance cases for guidance in resolving this question.

The term nuisance is notoriously difficult to define,[9] but it is at least possible that the drifting barge constituted a nuisance.[10] If so, did or could the state's acts or omissions constitute either contributory negligence or a failure to avoid damages?

In a nuisance setting it is often difficult to distinguish a plaintiff's contributory negligence from his failure reason-

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[9] "There is general agreement that [the word 'nuisance'] is incapable of exact or comprehensive definition." W. Prosser, *supra* note 6, at 571. The Restatement divides nuisance into two types, an unreasonable interference with a right common to the general public (public nuisance) and a nontrespatory invasion of another's interest in the private use and enjoyment of land (private nuisance). Restatement (Second) of Torts §§ 821B and 821D. It is often said that a public nuisance is always a criminal offense (the Restatement rejects this view, *id.* at §§ 821B, Comment d) and there is some question whether there may be tort liability for a public "nuisance" that is not a crime, W. Prosser, *supra* note 6, at 586.

[10] "[A] condition . . . that unduly interferes with the use of . . . a public place . . . [is a nuisance]. The interference may make the use of the affected area . . . dangerous or prevent its utilization." Seavey. *Nuisance: Contributory Negligence and other Mysteries,* 65 Harv.L.Rev. 984, 984-85 (1952).

ably to avoid foreseeable consequences. In fact some courts and commentators discuss the two together while noting that the former bars a plaintiff's claim while the latter only reduces his damage award.[11] In principle one is required to avoid or mitigate damages only after the defendant has committed a tort but in a nuisance context the threat itself can be viewed as the tort. In the present case the result of finding that the state was contributorily negligent or that it failed to avoid foreseeable consequences is precisely the same — reduction of damages.

Some courts and commentators have flatly stated that contributory negligence is not a defense to nuisance liability.[12] Others including the authors of the Restatement of Torts have stated that contributory negligence is a defense to a nuisance resulting from negligent conduct of the defendant.[13] Some courts have declared that a plaintiff need

[11] *See, e.g., Ford Motor Co.* v. *Dallas Power & Light Co.*, 499 F.2d 400, 414-15 (5th Cir. 1974); C. McCormick, Law of Damages 128-30, 137-40 (1935); W. Prosser, *supra* note 6, at 608-12; Seavey, *supra* note 10, at 988-90.

[12] *See, e.g., Paddock* v. *Somes*, 102 Mo. 226, 14 S.W. 746 (1890); F. Harper & F. James, The Law of Torts § 22.8 (1956); James, *supra* note 8, at 715-23; H. Wood, The Law of Nuisances 126, 506-07 (2nd ed. 1883).

[13] *See, e.g., McFarlane* v. *Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928) (Judge Cardozo disavowed any holding by implication that would apply to a situation where a defendant's conduct went beyond negligence); Restatement (Second) of Torts § 840B (1965) and Comment d which states that "many nuisances . . . are the result of mere negligence in failing to take proper precautions to prevent the invasion of the right. When this is the case the contributory negligence of the plaintiff is available as a defense as fully and under the same rules and conditions as in the case of any other action founded upon negligence"; C. Martz, Rights Incident to Possession of Land 72-73 (1954); W. Prosser, *supra* note 6, at 608-12 (also noting the difficulty in drawing the dividing line between intent and negligence). *Cf.* Seavey, *supra* note 10, at 986-88 (negligence is a requisite to liability for a nuisance except where defendant is aware of the harmful effects created by his conduct).

not abate a nuisance or take affirmative steps on his premises to ward off a nuisance.[14] Others have found plaintiff's claim barred when, without committing a trespass, he could have abated a nuisance caused by defendant's negligence.[15] Specifically, courts have found plaintiffs contributorily negligent for failing to bury an animal decomposing on adjacent land, *Central of Georgia Ry. Co.* v. *Steverson*, 3 Ala.App. 313, 57 So. 494 (1911), and failing to avoid flood damage by building a levee, *Mobile & O. R. Co.* v. *Red Feather Coal Co.*, 218 Ala. 582, 119 So. 606 (1928), or by plowing a furrow, *Louisville & N. R. Co.* v. *Moore*, 31 Ky. 141, 101 S.W. 934 (1907) (proof of failure to plow requires the trial court to instruct the jury on remand that no damages avoidable by plaintiff's exercise of ordinary care be awarded).

In admiralty, contributory negligence does not bar a plaintiff's claim but only serves to lessen his recoverable damages in proportion to his fault as compared to defendant's. The more recent commentaries have argued persuasively that contributory negligence does and should operate in the nuisance area just as in other areas of tort law, and some courts have found plaintiffs contributorily negligent for failing reasonably to abate a nuisance or avoid its consequences (although a "trend" is less clear in case law than in commentaries). A finding of contributory neg-

[14] *See, e.g., Paddock* v. *Somes*, 102 Mo. 226, 14 S.W. 746 (1890); Annot., 73 A.L.R.2d 1378, 1383-85. For commentary supporting the correctness of this view see F. Harper & F. James, and H. Wood, note 12, *supra*.

[15] *Wis. & Ark. Lumber Co.* v. *Scott*, 167 Ark. 84, 267 S.W. 780 (1924); *Louisville, N. O. & Texas R. Co.* v. *Jackson*, 123 Ark. 1, 184 S.W. 450 (1916). For instances of courts holding that a plaintiff was under no duty to abate a nuisance or avoid or minimize damages specifically because to do so plaintiff would have to commit a trespass, *see Missouri Pac. R. Co.* v. *Baker*, 188 Ark. 143, 64 S.W.2d 321 (1933); *Chicago R. I. & P. R. Co.* v. *Carey*, 90 Ill. 514, 517 (1878); *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 319 (1860).

ligence might well be incorrect as a matter of law in a case where the defendant acted willfully or recklessly[16] or where a plaintiff could protect himself only by committing a trespass.[17] Here, however, those responsible for the barge acted only negligently and the state or a tugboat company could have secured or removed the barge without committing a trespass.[18] Noting these aspects of this case and the fact that contributory negligence does not act as a bar in admiralty, we support the district court's finding of contributory negligence even if the drifting barge constituted a nuisance.

A plaintiff is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of a tort.[19] The reasonableness of a plaintiff's act or omission depends on "the extent of threatened injury, as compared with the expense of remedying the situation, and the practical certainty of success in preventive effort." *Mobile & O. R. Co.* v. *Red Feather Coal Co.*, 218 Ala. 582, 119 So. 606 (1928).[20]

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[16] "When the harm is intentional or the result of recklessness, contributory negligence is not a defense [to nuisance]." Restatement (Second) of Torts § 840B(2) (1965).

[17] *See, e.g., Missouri Pac. R. Co.* v. *Baker*, 188 Ark. 143, 64 S.W.2d 321 (1933).

[18] The district court stated that a tug towing or securing the barge would have had a lien on the barge. 415 F.Supp. at 603. For a discussion of the nature and incidents of salvage, *see* G. Gilmore & C. Black, *supra* note 3, at 443-79.

[19] *See, e.g.*, C. Martz, *supra* note 13, at 46 & n.33, 151 & n.31; C. McCormick, *supra* note 11, at 127-41; Restatement (Second) of Torts § 918 (1977).

[20] Our holding does not address the issue whether plaintiff's duties were both to avoid harm to itself and also to avoid harm to third parties threatened by plaintiff's inaction. This issue is not before us; it may be controlled by state negligence law, and a proper analogy might be to those cases dealing with a person's duty to rescue another.

In the present case the district court found that the possibility of a collision was foreseeable to agents of the state and noted that ascertaining and notifying the barge's owner or calling a local towing service would have required either "some" or no expenses. The collision caused the bridge to sustain damages of $123,025.47 and required closing two lanes of traffic. Any expenses in summoning aid pale in comparison.

We therefore reject the state's argument that its fault could not be based on failure to act in these circumstances, whether such omission be described as contributory negligence or failure to avoid damages.

We agree with the district court's conclusion that the doctrine of last clear chance is inapplicable in this case. As the district court's canvass of authority indicates, the doctrine of last clear chance is rarely applied in admiralty collision cases[21] and then only where there is a definite line of cleavage between the final fault and the preceding acts of negligence, 415 F.Supp. at 606-07; *accord,* J. Griffin, *supra* note 3, at § 215 (1949). *See generally* Annot. 3 A.L.R. Fed. 203 (1970). We find a lack of cleavage on these facts for purposes of applying the last clear chance doctrine.

AFFIRMED.

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[21] The doctrine was applied, however, in *The Sanday,* 122 F.2d 325 (2d Cir. 1941), and *The Cornelius Vanderbilt,* 120 F.2d 766 (2d Cir. 1941). In *Crawford* v. *Indian Towing Co.*, 240 F.2d 308, 311 (5th Cir. 1957), this Court found that one vessel "clearly had the last clear chance to avoid the collision." The other vessel's negligent action was not the proximate cause of the injury and thus not a basis of liability "[w]hether this be called an application of the doctrine of last clear chance or the rule of causation . . . ."

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

January 18, 1980

TO ALL PARTIES LISTED BELOW:

No. 76-4447

S. C. LOVELAND, INC.
vs
EAST WEST TOWING, INC., ETC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, *Clerk*

By s/ H. E. ADAMS, JR.
Deputy Clerk

APPENDIX C

S. C. Loveland, Inc., *Plaintiff*,

v.

East West Towing, Inc., E. & I., Inc. in personam, and the Tug Miss Carolyn, her engines, tackle, furniture, appurtenances, etc., in rem, Defendants.

State of Florida, Department of Transportation, *Plaintiff*,

v.

S. C. Loveland, Inc. and East West Towing, Inc., in personam and the Tug Miss Carolyn, her engines, etc. and the Barge Loveland 34, in rem, Defendants.

St. Paul Mercury Insurance Company et al., *Plaintiffs*,

v.

East West Towing, Inc., *Defendant*.

Nos. FL 73-43-Civ-NCR, FL 73-61-Civ-NCR and FL 74-396-Civ-NCR.

United States District Court, S. D. Florida, Ft. Lauderdale Division.

May 21, 1976.

Christian D. Keedy, of Smathers & Thompson, Miami, Fla., for S. C. Loveland, Inc.

Geoffrey B. Dobson, Tallahassee, Fla., for State of Florida, Dept. of Transportation.

William L. Von Hoene, New Orleans, La., Dewey R. Villareal, Jr., of Fowler, White, Gillen, Boggs, Villareal & Banker, Tampa, Fla., for East West.

Theodore G. Dimitry, of Vinson, Elkins, Searls, Connally & Smith, Houston, Tex., for St. Paul Mercury Ins., et al.

Ron FitzGerald, of Fleming, O'Bryan & Fleming, Ft. Lauderdale, Fla., for E. & I., Inc. and tug MISS CAROLYN.

ROETTGER, District Judge.

These three admiralty cases arose out of a collision between a barge which dragged anchor at its anchorage in the mouth of Tampa Bay and crashed into the Sunshine Skyway Bridge, owned by the State of Florida.

Shortly after the collision, the barge owner S. C. Loveland Inc., brought suit against the tug MISS CAROLYN in rem and against East West Towing, Inc. and E. & I., Inc. in personam. East West Towing and E. & I., the past and present owners of the tug MISS CAROLYN, cross-claimed against each other for damages resulting from any liability to plaintiff.

Shortly thereafter, the State of Florida filed suit against S. C. Loveland, Inc. and East West Towing in personam and against the tug MISS CAROLYN and the barge LOVELAND 34, in rem. S. C. Loveland cross-claimed against East West Towing and the tug MISS CAROLYN.

St. Paul Mercury Insurance Company and two other insurance companies sought a declaratory judgment to declare the policy of insurance issued to East West null and void because of its alleged change of ownership or management of the vessel without written consent of the underwriters. Both S. C. Loveland, Inc. and E. & I. intervened, asserting an interest as potential beneficiaries of the policy.

The suits were consolidated for purposes of pleading and trial. Findings of fact and conclusions of law will be set forth in this memorandum opinion.

FINDINGS OF FACT

E. & I., Inc., a Florida corporation, had a contract for purchase of the tug MISS CAROLYN for $175,000 from East West Towing, Inc., a Louisiana corporation. The closing had been delayed a couple of times and the final closing date was set for August 17, 1973. On the 16th of August representatives from E. & I., Mr. Manion and Capt. Landreth, flew to New Orleans expecting to hold a closing. By then the condition of obtaining financing had been satisfied so that the closing could proceed. When the E. & I. representatives arrived in New Orleans, the tug MISS CAROLYN was not in port; instead she had been dispatched with a tow by East West Towing on the 14th of August and was en route to Florida. The original contract of towage had been modified to extend her destination to Jacksonville rather than Tampa.

The tow was the barge LOVELAND 34, an unmanned (dumb) 115 feet steel barge with about 2½ feet of freeboard. The barge had no fixed superstructure and was carrying a cargo of two large objects which were chemical reactors.

E. & I. had expected to take command of the tug MISS CAROLYN and depart for Grand Cayman immediately after the closing and had charts for that intended voyage. Since the tug MISS CAROLYN was not in port, East West and E. & I. found themselves engaged in further negotiations. East West desired E. & I. to take over the tow but E. & I. declined; they did not have the appropriate towing liability insurance and did not want to secure it because of the costs involved.

The testimony was unequivocal that the sale would not go through unless arrangements could be made for East West to complete the tow. East West tried to obtain the services of a tug in Tampa but was unable to do so. Conse-

quently, the parties agreed on an arrangement whereby East West would dispatch the tug GARY STEPHENS to cross the Gulf directly to Tampa. There it would take over the tow from MISS CAROLYN when she arrived in the Tampa area.

The court finds that it was the clear intention of the parties that command of the tug MISS CAROLYN would not be turned over to E. & I. until the tow had been taken to Tampa Bay. The court further finds that it was the intention of the parties that the tow would be taken over in the Tampa Bay area by the tug GARY STEPHENS which, although owned by Delta Boat & Barge, was operating under the authority of East West. The testimony of all the witnesses of East West alone compels the finding that no documents of sale would have been executed by E. & I. for the purchase of the vessel absent the agreement to permit the GARY STEPHENS to pick up the tow in Tampa. E. & I.'s witnesses add further support to that finding. The documents were executed on the night of August 16th and the respective parties celebrated the occasion that evening in New Orleans.

Meanwhile, by noon on the 16th the tug MISS CAROLYN had arrived at Panama City, Florida with her tow and stopped there. Jay Landreth was flown to Panama City on the afternoon of the 16th and went aboard the tug MISS CAROLYN. The ship's license was brought back by the pilot of the seaplane and given to the lender's agent as required by the lender prior to the disbursing of funds.

In the first of a series of unusual errors in communication, an East West officer, Mr. Dupre, called the captain on MISS CAROLYN, Capt. Verdin, that same afternoon and advised him that the boat was sold. Evidently he did not further advise Capt. Verdin that the sale was conditioned on the tow being completed by East West with the tug

GARY STEPHENS picking up the tow at Tampa. This created the unusual situation of Capt. Verdin thinking the boat had been sold when the contract purchaser's skipper, Capt. Landreth, came aboard in Panama City.

The court specifically finds that Capt. Landreth had no intention of taking over command and did not do so at Panama City. Capt. Verdin retained command although he was clearly in an Alphonse-Gaston situation with Landreth in the sense that he was seeking Landreth's advice and, perhaps, even deferring to Landreth on occasion.

The court finds there is an extremely sound reason why Capt. Verdin would do that: he had never been to the Tampa area — in fact, he had never been east of Panama City — while Capt. Landreth had experience in Tampa waters.

This scene aboard the tug MISS CAROLYN at Panama City was a bit unusual: the crew advised Landreth they couldn't go on because they had no fuel. They had no groceries. They had no charts. In fact, they were navigating by means of a Texaco road map. There was some evidence that they had planned to pick up charts in Louisiana before leaving but had failed to do so. Since the barge must proceed outside from Apalachicola to Tampa, Landreth checked the compass and found it had a deviation of more than 50 degrees; Landreth plotted a course to compensate for that compass error and subsequently the tug MISS CAROLYN left for Tampa.

Before they departed Panama City Landreth gave money to one of the crew members to obtain groceries; Landreth also obtained fuel at the Gulf docks where the tug was tied up. The testimony was uncontradicted that E. & I. would be reimbursed for the fuel used by the tug in getting the tow to Tampa.

The court observes that Capt. Verdin had a license for inland and western waters but not for open water. Capt. Verdin had only two or three months of formal schooling in his life. Apparently, he did not know where Jacksonville was and expressed surprise to Capt. Landreth at the distance from Panama City to Jacksonville.

Somewhere en route to Tampa about 3 A.M. on the 18th Capt. Vedin got lost, then woke up Landreth, who took the wheel. This squares with the marine operator's report that there was a call from the tug MISS CAROLYN requesting navigational assistance about that time on the morning of the 18th. When the tug MISS CAROLYN got to the mouth of Tampa Bay, where it is spanned by the Sunshine Skyway Bridge, there was a discussion between Capt. Verdin and Capt. Landreth about where to anchor the barge. Finally, the anchorage site in the spoil banks, just east of the Sunshine Skyway Bridge on the south side of the channel, was selected and the barge was anchored there about 10 A.M.

There is no evidence before the court that there was anything other than sufficient cable payed out for the anchor. The tug MISS CAROLYN continued on to the Nilo Docks in Tampa located about 30 miles and a three-hour run from the anchorage. East West has urged throughout the trial that there was some urgency on the part of E. & I. to get the boat to Fort Lauderdale and that was the reason for anchoring the barge in the spoil banks. However, that does not square with the evidence.

The court finds that the only purpose in leaving the barge in that location is so that it would be convenient for the tug GARY STEPHENS to pick it up. It could not be a benefit to E. & I. because E. & I. had already made arrangements for their personnel to meet the tug MISS CAROLYN at the Nilo Docks in Tampa. MISS CAROLYN arrived at

the Nilo Docks on the afternoon of the 18th and Capt. Verdin contacted East West. At that time the crew of E. &. I. which was to take the tug around to Fort Lauderdale had not left Fort Lauderdale and did not arrive in Tampa until about 11 P.M. Further, MISS CAROLYN didn't leave until the afternoon of the 19th and had to make the three-hour run again from the Nilo Docks to proceed seaward from Tampa Bay.

The court finds that dropping the barge off at the spoil banks anchorage was not for the benefit of E. & I. but solely for the benefit of East West. That is further corroborated by the testimony of Mr. Manion who received a call on the 18th from the MISS CAROLYN about leaving the barge at anchor; he stayed on the marine phone to the tug and called Dupre of East West on a land line to see what to do. Dupre advised Manion that he had just talked to the tug GARY STEPHENS which said it was only three or four hours from Tampa and that he could see no reason to take the tow on to Nilo Docks.

Whatever change of command ceremony occurred for the tug MISS CAROLYN did not occur until MISS CAROLYN had been tied up at the Nilo Docks. Not until then did Landreth assume command and control of the tug for E. & I.

Meanwhile, the whereabouts of the tug GARY STEPHENS remains a bit of a mystery because the evidence is rather muddled. Buras of East West testified that GARY STEPHENS was sent across the Gulf to Tampa in accordance with the agreement in New Orleans. Otherwise, the tug would inevitably be several days behind MISS CAROLYN if it tried to track the route of MISS CAROLYN. Unfortunately, no one explained this to Capt. Ellis of GARY STEPHENS who testified that he proceeded via Panama City.

The court takes judicial notice that it is about 400 nautical miles from Venice, Louisiana to Tampa Bay; travelling at 10 knots light boat GARY STEPHENS should have been there in the evening of the 18th or no later than the morning of the 19th. Even though there was some testimony by Capt. Ellis concerning an air compressor breaking down on the 19th causing him to run at half speed thereafter, he would already have been at Tampa Bay had he proceeded across the Gulf.

Although GARY STEPHENS apparently was in Panama City at the time of anchoring the barge, East West was telling people that the tug was two to three hours out of Tampa; consequently, there was little reason for anyone to worry about anchoring the tow in spoil banks on the 18th. Two disinterested witnesses, marine operators Mr. Pope and Mr. Burtle, said there was an indication GARY STEPHENS was in the Egmont Channel near Tampa Bay when MISS CAROLYN sent a message that it was going to drop the barge by the Skyway Bridge.

The final confusion about the whereabouts of GARY STEPHENS was found in its log, viz, the entry at 2 P.M. on the 20th of August: "in Tampa Bay looking for the barge LOVELAND 34." The log entry is incomprehensible because the tug, in order to enter Tampa Bay, would have gone close by the barge which was within a stone's throw by maritime distances from the channel and just east of the Sunshine Skyway Bridge. Regardless of where the tug GARY STEPHENS was, it wasn't there when the ship hit the span; and its failure to be there was solely the fault of East West.

THE BARGE

Neither the Coast Guard nor the American Bureau of Shipping required that the barge have an anchor. However, the barge did possess a five-hundred pound Danforth

anchor which was suitable under the standards of the American Bureau of Shipping for a barge of its size with no fixed superstructure. However, Loveland's expert witness conceded that if the cargo aboard the barge had been considered a fixed superstructure, a seven hundred fifty pound Danforth anchor would have been required.[1]

S. C. Loveland, the executive head of Loveland expected East West to provide him with the morning position report which Ms. Buras of East West was to obtain from the tug. East West was also to report any irregularities to him. East West did not advise Loveland of a contract for sale or closing as to the tug MISS CAROLYN. Loveland called Ms. Buras in the evening of the 18th and was told the tug was leaving Tampa that evening. (East West's crew had disembarked about 6 P.M.) On the 19th Loveland received no position report and called East West at noon. For the first time Loveland learned that the barge was being towed — or supposed to be — by GARY STEPHENS, but East West had no position report for the barge or GARY STEPHENS. Somewhat concerned, Loveland called the bridges over the Intracoastal Waterway from Tampa south to Fort Myers and learned that the tow had not passed their location. On the morning of the 20th Ms. Buras of East West had no position report; Loveland called the bridge at Fort Myers but it had no record of the tow. Becoming increasingly concerned, Loveland called the Tampa port authority on the 20th. When they did not call back, he called the Coast Guard in the morning; after lunch they reported that they had no sighting of the barge. Then Loveland called East West and talked with Mr. Dupre who did not know where the tug or barge was. At 4:21 E.D.T. Loveland sent a telegram:

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[1] This raises serious questions about the reliability of such standard, particularly since the two large reactors necessarily provided similar wind resistance to a fixed superstructure of equivalent size.

"MR OR MRS BURAS: WE ARE DEEPLY CONCERNED ON RECEIVING YOUR ADVICE THAT THE TUGS [SIC] GARY STEVENS [SIC] HAS BEEN SUBSTITUTED FOR THE TUG MISS CAROLYN [SIC] IN PROVIDING TOWING SERVICES FOR OUR BARGE LOVELAND 34 ENROUTE FROM NEW ORLEANS TOWARDS JACKSONVILLE FLORIDA WE ARE FURTHER CONCERNED THAT NO RESPONSIBLE OPERATING OFFICIAL OF YOUR ORGANIZATION KNOWS THE WHEREABOUTS OF THE TUG NOR THE ROUTING WE NEVER EMPLOY A TUG WITHOUT INSPECTING IT AND ITS TOWING GEAR WE WILL HOLD YOU FULLY RESPONSIBLE FOR ANY DAMAGE TO THE BARGE AND ITS CARGO OR ANY EXPENSE INCURRED RESULTING FROM THIS SUBSTITUTION AND POSSIBLE ROUTING AROUND KEY WEST WITHOUT OUR AUTHORITY"

Later that evening the Coast Guard in St. Petersburg called Loveland and advised him that the barge was against the bridge. Loveland called a firm in Tampa and hired a tug; within 30 minutes the tug ONSLOW was underway and took the barge from the Coast Guard cutter between nine and ten o'clock, shortly after the cutter had taken the barge from the bridge.

THE BRIDGE

At first blush it seems unlikely that a fixed object, such as a bridge — especially one as large as the Sunshine Skyway[2] could be guilty of any negligence. However, the evidence was uncontradicted that the barge dragged anchor

[2] The bridge's dimensions speak for its size: main channel clearance is 800 feet horizontally with a vertical clearance of 140 feet above the mean high water line. Its north trestle approaches exceed one mile in length while the south one exceeds two miles; the channel approaches and clearance span are 5621 feet long.

on the afternoon of the 19th, the day before the collision and drifted closer to the bridge. This occurred during a thunderstorm and the barge moved from the south side to the north side of the channel. The bridge's owner, the State of Florida, called the Coast Guard but did nothing more.

Again on Monday, the 20th, the Coast Guard was notified that the barge was drifting dangerously close to the bridge. The bridge tender had called the bridge foreman for the State of Florida Department of Transportation between 3:00 and 3:30 on the 20th; and the Coast Guard was called between 4:00 and 4:30. The bridge tender called again between 5:00 and 6:00 o'clock and warned that the barge was drifting towards the bridge; again the bridge foreman called the Coast Guard. Shortly thereafter the toll taker called during a rain squall to advise that the barge was up against the bridge.

The Coast Guard tender did not arrive until later in the evening. The bridge was shaking back and forth during the storm with the barge rubbing alongside. Approximately 15 minutes was required for the Coast Guard to haul the barge away from the bridge. The testimony was uncontradicted that there were thunder showers, in fact a squall, on both the afternoons of the 19th and 20th. The weather on the 18th had been considerably better. The court finds that afternoon thunderstorms in August are a common and foreseeable occurrence in the Tampa Bay area.

The employees on the bridge had been watching the barge with binoculars and could identify it. A number of options were available to the State other than merely calling the Coast Guard repeatedly as they watched the barge drift closer: (1) After learning the barge's identity, a check could have been made as to the owner of the barge and a call placed to S. C. Loveland. Mr. Loveland's frantic

activity in trying to locate the barge and prompt action after learning of its whereabouts indicates Loveland would have taken the necessary steps to have the barge taken under tow. (2) A local towing service could have been called. From the quick action of the tug ONSLOW, such action on the part of the State would have prevented the collision. Although it would have required perhaps some expense on the part of the State, the tug would have had a lien on the barge so that any such preventive action would have resulted in no expense — and more importantly, no damage — to the State.

However, the Department of Transportation did nothing more than call the Coast Guard and watch the barge drift into the side of the bridge, thereby causing one span (two lanes) to be closed. The failure to take sufficient action was unjustified since this was not the first time that a vessel had drifted into the bridge: a Liberty Ship and at least one other barge had previously done so.

DAMAGES TO THE BRIDGE

The State of Florida paid a sum of $123,025.47 on the original contract for repairs. The court disallowed a supplemental charge of $18,000 and the overhead charge in the amount of $4,940.25 as unreasonable charges.

DAMAGES TO THE BARGE

No dispute is made as to the amount of damages to the barge: $2,743.64.

INSURANCE QUESTIONS

The insurance policy covering MISS CAROLYN, with East West Towing, Inc. as the named insured, contains a number of pertinent endorsements: endorsement # 24 is

dated August 16, 1973 and extends the navigation warranty for the tug MISS CAROLYN to inland and coastal waters between Brownsville, Texas and Jacksonville, Florida. The effective date of this endorsement is August 10, 1973. Endorsement # 25 to the same policy, extending the navigation warranty for the tug GARY STEPHENS to the inland and coastal waters between Brownsville, Texas and Port of New York, is dated August 21, 1973 and was made effective August 20th, 1973.[3]

Mr. Buras of East West testified that he told his insurance agent on the 17th that he had sold MISS CAROLYN and that she had a tow. He discussed the whole matter with the agent, advising him that the regular captain [Verdin] was aboard and that the representative of E. & I. was also aboard. The agent assured him not to worry about it and that "he would take care of it". In addition, East West never received any premium refund for the period August 16th to the 21st.

Endorsements #26 and #27 delete the tug MISS CAROLYN from the policy, effective August 21, 1973 and provide for a return of premium from August 21, 1973. These endorsements were dated September 19, 1973 and the date of August 21st was arrived at after the collision.

CONCLUSIONS OF LAW

This court has admiralty jurisdiction over the collision of the unmanned barge LOVELAND 34 (barge) with the Sunshine Skyway Bridge (bridge).

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[3] It is interesting to note that endorsement # 23 dated August 16, 1973 names Delta Boat & Barge Rental Inc. as an additional insured under the policy. Delta Boat & Barge was the owner of the tug GARY STEPHENS and the date of the endorsement squares with the agreement of that date to send GARY STEPHENS across the Gulf of Mexico to take over the tow.

Liability of East West and the Tug MISS CAROLYN

East West and the tug MISS CAROLYN entered into a contract of towage of the barge LOVELAND 34 with S. C. Loveland to tow the barge from New Orleans to Jacksonville. East West and the tug MISS CAROLYN accepted responsibility for the safety and care of the barge at the beginning of the voyage. The responsibility is a continuing one which terminates only when the tow is safely anchored at its ultimate destination. See *Allied Chemical & Dye Corp.* v. *Tug Christine Moran,* 303 F.2d 197 (2d Cir. 1932); *United States* v. *Powell Bros.* v. *Barge No. 128,* 249 F.Supp. 553 (S.D.Fla.1965). If delivery cannot be made as planned, then it is the duty of the tug to tie its tow in a safe place, free and clear of any obstructions, and protect it until delivery can be made. See *Allied Chemical & Dye Corp.* v. *Tug Christine Moran,* supra; *Gulf Oil* v. *Tug Gulf Explorer,* 337 F.Supp. 709 (E.D.La.1971). Thus, the duty of East West and the tug MISS CAROLYN to care for, protect and render assistance to the barge was not terminated or suspended when the barge was at anchor in Tampa Bay.

East West and the tug MISS CAROLYN owed the barge an implied warranty of workmanlike service; that is, a duty to perform its towing services properly and safely, once having undertaken the responsibility. See *Fairmont Shipping Corp.* v. *Chevron International Oil,* 371 F.Supp. 1191 (S.D.N.Y. 1974); *Singer* v. *Dorr,* 272 F.Supp. 931 (E.D.La. 1967). Although a tug is not liable as an insurer against any damage to its tow or caused by its tow while under its custody and control, a tug owes its tow the duty to exercise such reasonable care and maritime skill as prudent navigators employ in the performance of similar services and to man the tug with competent personnel. See *Stevens* v. *The White City,* 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 669 (1932); *Hart* v. *Blakemore,* 410 F.2d 218 (5th Cir. 1969); *Stall & McDermott* v. *The Southern Cross,* 196 F.2d 309 (5th Cir. 1952); *Gulf Corp.* v. *Gulf Tug Explorer,* supra.

East West and the tug MISS CAROLYN breached its contract of towage and were negligent in leaving the barge unattended in an exposed area in close proximity to the bridge from the morning of August 18th until the afternoon of August 20th. East West and the tug MISS CAROLYN failed to exercise reasonable care by improperly anchoring the barge in a spoil bank, in failing to take any measures to protect and safeguard the barge once anchored and further in failing to inform the owners of the barge of the change in circumstances. Cf. *L. R. Connett & Co.* v. *The Republic No. 5,* 43 F.Supp. 245 (S.D.N.Y.1941).

The tug MISS CAROLYN, under the control and management of the crew employed by East West, was negligent in anchoring its tow in spoil banks and leaving it unattended rather than taking the tow to the Nilo Docks. The court finds that this negligence, which continued up until the time of the collision, was a proximate cause of the collision for which East West is responsible in personam and for which the tug MISS CAROLYN is responsible in rem.

The consequences of leaving an unmanned barge in the middle of Tampa Bay for a two day period, in an exposed area and with the reasonable likelihood of adverse weather conditions, was entirely foreseeable to those who undertook responsibility for the care and safety of the barge. Thus, the tug MISS CAROLYN and East West owed a duty of care to all those within the reach of the barge's destructive power. See *Petition of Kinsman,* 338 F.2d 708, 722 (2d Cir. 1964).

The court further finds that East West and the tug GARY STEPHENS were negligent in failing to promptly pick up the barge which had been left unattended and the

crew of the tug GARY STEPHENS was negligent in failing to come to the aid of the barge prior to the time the barge dragged anchor and drifted into the bridge. East West was further negligent in failing to obtain a relief tug after it knew or should have known that the barge was left unattended in an exposed area in close proximity to the bridge. The court finds that this negligence of East West was separate and distinct from the negligence of the tug MISS CAROLYN in leaving her tow unattended and that this negligence also proximately contributed to the collision of the barge with the bridge. Since the court has no in rem jurisdiction over the tug GARY STEPHENS, the negligence attributed to the tug GARY STEPHENS must be assessed against East West in personam. See *Platoro Limited* v. *Unidentified Remains of a Vessel,* 508 F.2d 1113 (5th Cir. 1975); *Dow Chemical* v. *Barge UM-23B,* 424 F.2d 307 (5th Cir. 1970).

Exoneration of S. C. Loveland and Its Barge

The barge owed the tug MISS CAROLYN a warranty of seaworthiness. In order to be seaworthy, the barge need only be reasonably fit for its intended purpose. See *Gutierrez* v. *Waterman SS Corp.,* 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963). A vessel's purpose establishes the standard by which the warranty of seaworthiness must be judged. *Parker* v. *S/S Dorothe Olendorff,* 483 F.2d 375 (5th Cir. 1971), cert. den. 416 U.S. 905, 94 S.Ct. 1609, 40 L.Ed.2d 110 (1974). The barge was an unmanned vessel; while under the exclusive custody and control of its tug the barge's ground tackle was only intended to be used in emergencies for short periods of time and was reasonably fit for its intended purposes. The size of the anchor conformed to the standards established by the American Bureau of Shipping. A competent crew would have reason to know of the limited purposes for which the anchor was

to be used, as established by the testimony of Captain Landreth. Under the circumstances, the failure to have a heavier anchor did not render the barge unseaworthy. See *Powell Bros.* v. *Barge No. 128, supra.* In any event the proximate cause of the collision was the failure of the tug MISS CAROLYN to properly care for and protect the unmanned barge, after anchoring it in an exposed area. Cf. *Gulf Oil* v. *Gulf Tug Explorer,* supra.

The warranty of seaworthiness does not inure to the benefit of the bridge or to any other stationary object. See *The Cullen No. 32,* 62 F.2d 68 (2d Cir. 1932), aff'd 290 U.S. 82, 54 S.Ct. 10, 78 L.Ed. 189 (1933); *Petition of Mahoney,* 255 F.Supp. 310 (D.N.H.1966). The duty of a barge to a bridge is based on negligence; however, the duty to exercise reasonable care is circumscribed by the fact that the barge was unmanned and under the exclusive custody, care and control of the tug MISS CAROLYN pursuant to a contract of towage. Cf. *Allied Chemical & Dye* v. *Tug Christine Moran; Gulf Oil* v. *Tug Gulf Explorer,* supra. By relinquishing the custody of the barge to the tug MISS CAROLYN, the barge and its owners were entitled to rely on the competence of the tug to fulfill the task for which it contracted; that is, to safely and properly tow the barge to its ultimate destination. Under the circumstances, the risk to which the barge was exposed and the resulting collision were not foreseeable. Therefore, the court concludes that the barge and its owners, S. C. Loveland, were not negligent. Under the circumstances, S. C. Loveland exercised reasonable care for the safety of its barge, including taking all possible measures to ascertain the whereabouts of its barge.

Exoneration of E. & I.

E. & I. never assumed a contract of towage, never assumed any duty or responsibility for the safety and protection of the tow. The decision to anchor the barge in the

exposed area in Tampa Bay was the decision of the crew of East West and the tug MISS CAROLYN and not the decision of E. & I. Therefore, E. & I. is not liable for the collision of the barge with the bridge.

Liability of State of Florida

The State of Florida, Department of Transportation has a duty to exercise reasonable care and take reasonable precautions for the safety and protection of its own property. The court finds that the State of Florida, through its agents, breached this duty and is therefore negligent. The court finds that the negligence of the Department of Transportation was a proximate cause of the collision of the barge with its bridge and the resulting damage to its bridge and the damage incurred by S. C. Loveland.

Specifically the court holds that the Department of Transportation was negligent in taking no action to prevent the drifting barge from colliding with its bridge other than contacting the Coast Guard. No efforts were made to determine the ownership of the barge, to attempt to contact the owner or to summon any of the many tugs in the Tampa Bay area to come to the assistance of the apparently abandoned barge. Since the occurrence of severe thunderstorms is not unusual on August afternoons in the Tampa Bay area, the possibility of an eventual collision with the bridge was foreseeable to the agents of the Department of Transportation watching the barge drift in the direction of the bridge, particularly since a cargo ship and at least one barge had previously hit the bridge.

Last Clear Chance

Although the State of Florida, Department of Transportation was the only party who was not sued by any other party in this consolidated litigation either directly or by

counterclaim or crossclaim, it now finds itself in a situation in which East West seeks to shift the entire burden of blame to the Department of Transportation for the damage to its bridge under the doctrine of last clear chance.

The court does not find the doctrine of last clear chance applicable under the circumstances of this case where the subsequent wrongful act or failure to act of the Department of Transportation did not break the chain of causation set in motion by the tug's initial act of leaving the barge unattended near the bridge, which negligence combined with the continuing negligence of East West and the tug GARY STEPHENS, continued up to and constituted a substantial proximate cause of the collision.

The doctrine of last clear chance has been applied selectively in admiralty collision cases primarily because of the application of the now-discarded division of damages rule and, in fact, at times merges with the "major-minor fault" exception. See *Petition of Kinsman Transit Company,* supra, at 719-720. In one line of cases, the doctrine has been applied where a vessel committing the later fault was contractually bound to care for the one guilty of the earlier fault of which the vessel held solely liable had become aware. See *Chemical Transporter* v. *M. Turecamo,* 290 F.2d 496 (2d Cir. 1961); *Houma Well Service, Inc.* v. *Tug Capt. O'Brien,* 312 F.Supp. 257 (E.D.La.1970). In another line of cases, the last clear chance doctrine is applied selectively to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the other party was aware and which could easily have been overcome by a simple change in navigation. See *Petition of Kinsman,* supra, at 720, citing Gilmore and Black, *The Law of Admiralty,* 404 and fn. 47. In still another line of cases, courts loosely refer to the doctrine of last clear chance when the earlier negligent act was simply

not a proximate cause of the collision. See *Crawford v. Indian Towing Co.,* 240 F.2d 308 (5th Cir. 1955).

The facts of this case most closely resemble *Petition of Kinsman,* supra, where an unmanned vessel became unmoored and crashed into the center of a bridge owned and operated by the City of Buffalo. The district court had found that the City of Buffalo was negligent in failing to raise the bridge before the drifting vessel collided and rendered the City solely liable under the doctrine of last clear chance, despite the earlier negligence of the wharfinger and a second vesel. The Court of Appeals refused to apply the doctrine of last clear chance under the circumstances, since the negligence of the wharfinger and the second vessel which had caused the vessel to become unmoored was not minimal and since the City of Buffalo was certainly not contractually bound to care for the vessels which had become unmoored. The Court of Appeals held that it would be a far cry from the selective application of the doctrine of last clear chance in admiralty collision cases to impose sole liability on the City of Buffalo and to exempt the vessel and the wharfinger from all liability for demolishing the City's property. Instead, it applied the doctrine of divided damages and approved a three-way division of damages between the City of Buffalo, the wharfinger and the owner of the second vessel.

APPORTIONMENT OF DAMAGES

On May 19, 1975, the Supreme Court abrogated the century-old rule of *The Schooner Catherine* v. *Dickenson,* 17 How. (58 U.S.) 170 (U.S. 1855), requiring the equal division of property damages in cases involving maritime collisions. *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). In its stead, the court adopted the rule requiring the damage to be

> "allocated among the parties proportionately to the comparative degree of their fault [except] when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."

Id. at 411, 95 S.Ct. at 1716, 44 L.Ed.2d at 262.

The fault in this collision must be apportioned among the tug MISS CAROLYN in rem, the tug GARY STEPHENS through its owners East West in personam, and the Bridge through its owners, the State of Florida Department of Transportation. Therefore, the court apportions fault as follows: 25% to State of Florida Department of Transportation, 50% to the tug MISS CAROLYN in rem, and 25% to East West in personam for its own fault as well as that of the tug GARY STEPHENS.

The court notes that the in rem liability of the tug MISS CAROLYN continues even though the tug underwent a change of ownership prior to the collision and even though the collision occurred through no fault of her present owners, E. & I. Judge Learned Hand in *Burns Bros.* v. *Central R. R. of New Jersey,* 202 F.2d 910 (2d Cir. 1953) explains the basis for the in rem liability of the vessel imposed without concern over whether the owner is actually at fault as a "vestigial devolution out of the [animistic] notion that anything that moves and kills a man shall be deodand to the king." *Id.* at 912. The guilt attaches to the thing by which the wrong has been done. Thus, in Edward the First's time:

> "If a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. It did not matter that the forfeited instrument belonged to an innocent person."

Id. citing Holmes, *The Common Law.* Thus, the court is faced with the incongruous result that by imposing in rem

liability on the tug MISS CAROLYN, an innocent party is forced to respond in damages because of the subsequent change in ownership.

Indemnification — E. & I. and S. C. Loveland

Under the wording of the contract of sale of the vessel, however, it is clear that E. & I. is entitled to contractual indemnification for any judgment it is required to pay arising from the in rem liability caused by the acts of East West and arising during the time that East West had management and control over the tug MISS CAROLYN.

S. C. Loveland is entitled to indemnification from East West for its costs and reasonable attorneys' fees incurred in successfully defending the claims asserted against it by the State of Florida Department of Transportation under the rationale of *Dow Chemical Co.* v. *Barge UM-23B,* 424 F.2d 307 (5th Cir. 1970), which is a theory of indemnification distinct from the *Ryan* doctrine. Although East West was not an insurer of the barge LOVELAND 34, East West undertook responsibility to safely and properly tow the barge to its ultimate destination, pursuant to the oral contract of towage. The owners of the barge LOVELAND 34 entrusted the custody and control of its barge to East West and the tug MISS CAROLYN. East West and the tug MISS CAROLYN breached their duty under the contract of towage by negligently allowing the barge to collide with the Skyway Bridge.

As between East West and Loveland, East West was certainly the party best situated to prevent the accident, since Loveland was without knowledge of the circumstances which led to its barge being anchored in the Tampa Bay area for over a two day period and was reasonably entitled to reply on its contract of towage with East West to safely tow its barge to the Jacksonville area.

As S. C. Loveland recognizes, it is only entitled to its attorneys' fees incurred in defending the action brought by the State of Florida and not those attributable to prosecuting its cause of action in FL 73-43-Civ-NCR for its own damages, intervening in FL 74-396-Civ-NCR or in prosecuting its action for indemnity. See *Cotten* v. *Two "R" Drilling Co.,* 508 F.2d 669 (5th Cir. 1975.)

Damages

The court has found that the State of Florida Department of Transportation has sustained damages in the amount of $123,025.47. Because the court has found the State of Florida to have contributed to the collision, the State of Florida is entitled to recover 75% of its damages from the tug MISS CAROLYN in rem and East West in personam.

The court has found that Loveland is entitled to recover damages it reasonably incurred in connection with the collision of its unmanned barge with the Skyway Bridge in the amount of $2743.64. Loveland would ordinarily be entitled to recover these damages from the State of Florida, the tug MISS CAROLYN in rem and East West in personam, recovering its damages jointly and severally. *The Alabama,* 92 U.S. 695, 23 L.Ed. 763 (1876). However, Loveland made no claim against the State of Florida. Therefore, Loveland is entitled to collect its damages in full from either the tug MISS CAROLYN in rem or East West in personam. *The Alabama,* supra; see *Pure Oil Co.* v. *Fred B. Zigler,* 105 F.Supp. 121 (E.D.La. 1952). Similarly, the tug MISS CAROLYN cannot recover contribution from the State of Florida since she did not assert a claim against it. Cf. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974); *Petition of Kinsman,* supra. However, East West has filed an amended answer and a counterclaim against the State of Florida Depart-

ment of Transportation. It is clear that, despite the joint and several liability of the tug MISS CAROLYN in rem and East West in personam, those parties are entitled to contribution, and indemnification where appropriate. *Petition of Bloomfield Steamship Company,* 422 F.2d 728 (2d Cir. 1970). Therefore, the damages suffered by S. C. Loveland are apportioned at two-thirds by the tug MISS CAROLYN in rem, and at one-sixth each against East West, in personam and the State of Florida,[4] although each remains jointly and severally liable to Loveland. See *The Alabama,* supra.

Insurance Policy

This court has jurisdiction over the interpretation of a marine policy of insurance under its admiralty jurisdiction.

Management is not limited to the specific person or persons having navigational control over the vessel. In *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co.,* 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197 (1940) the Supreme Court interpreted the term "management" within the context of the admiralty materialmen's lien statute to mean the person or entity having direction and control over the purposes for which the vessel is used such as to what port she shall go and what she shall carry.

In the context of this marine policy of insurance, the term "management" is similarly not limited to refer only to the

[4] Because Loveland sued only the tug MISS CAROLYN and East West, its damages would, of necessity, be apportioned between those two parties in proportion to their degree of fault. That would have required MISS CAROLYN to shoulder two-thirds of the damage and East West one-third. East West, by its counterclaim sought to recover its damages for any liability owed to Loveland. The court has found the comparative fault of East West and the State of Florida Department of Transportation to be equal. Thus, East West could recover one half of its liability from the State and each would be responsible for one-sixth of Loveland's damages.

person or persons physically navigating or plotting the navigational course. The composition of the crew of the tug MISS CAROLYN might change from voyage to voyage but the tug would remain under the control of East West if its managers determined to which ports the tug goes and to which uses the tug is put. Surely the underwriters would not seriously contend that its assent is needed each time a new captain or crew member is hired by East West. A change in management occurs under this broader definition only when the managers of East West surrender control over the direction of the tug and the uses to which she is put, such as when the tug is chartered to another person or entity. In *Whiteman* v. *Rhode Island Insurance Company,* 78 F.Supp. 624 (E.D.La.1948) prior to the time of the actual transfer of title of the vessel, the owner agreed to allow the purchaser to use the tug for all purposes. Thus, the owner surrendered total control over the tug and for the purposes of the change in management a de facto charter had taken place. See also, *Commercial Union* v. *Daniels,* 343 F.Supp. 674 (S.D.Tex.1972).

With the broader definition of management in mind, it is obvious that in the instant case there was no change of management until after the tug MISS CAROLYN docked at the Nilo Docks after anchoring the barge LOVELAND 34. Although a representative of E. & I. was on board the tug MISS CAROLYN from Panama City to Tampa and rendered navigational assistance to the crew, the tug was under the control of East West. In fact, the very sale of the tug MISS CAROLYN was conditioned on East West being able to complete its tow of the barge LOVELAND 34 which it had undertaken pursuant to contract with S. C. Loveland and this included the arrangement that the crew of East West would tow the barge LOVELAND 34 to Tampa. Only then would she be delivered to E. & I. If

E. & I. had management control over the tug MISS CAROLYN, the tug would never have left New Orleans for Jacksonville but would have remained in New Orleans until the representatives from E. & I. arrived to take her to the Grand Cayman Islands pursuant to arrangements made by E. & I. Not until after the tug anchored the barge LOVELAND 34 in Tampa Bay, did the management of the tug MISS CAROLYN change. Only after the barge was anchored and the tug was delivered to the Nilo Docks did E. & I. obtain control over the tug in the sense of being able to direct where the tug would go and to what purposes she would be employed. This occurred late in the afternoon of August 18, 1973.

The more difficult question is at what point in time a change in interest or ownership in the tug MISS CAROLYN relative to when the negligent acts occurred for which the tug MISS CAROLYN is liable in rem. Although the court is involved in interpreting a marine policy of insurance within its admiralty jurisdiction, the very narrow question of when title to the tug MISS CAROLYN passed is a question of state law. Since every state of the United States, except for Louisiana has adopted the substance of the Uniform Commercial Code, absent special circumstances, title to the vessel would pass upon delivery of the vessel to the purchaser. See e.g. F.S.A. § 672.2-401(2). The Civil Code of Louisiana does not require delivery as a condition of passage of title and, in fact, specifically provides that a sale is perfect upon the execution of the Bill of Sale. See *Big "A" Sand & Gravel* v. *Bay Sand & Gravel,* 282 So.2d 837 (La.App.1973).

Indeed Louisiana has always been a renegade among these United States. Its Supreme Court has refused to uphold the validity of the conditional sales contract while acknowledging that such contracts were recognized in all other states and by the United States Supreme Court. See

Barber Asphalt Paving Co. v. *St. Louis Cypress Co.,* 121 La. 152, 46 So. 193 (La.S.Ct.1908).

The fact of the nationwide acceptance of the Uniform Commercial Code is of no small significance to a court exercising its admiralty jurisdiction when so much of the lore of federal admiralty law stresses uniformity. Thus, although the sub-issue of passage of title is to be resolved by reference to state law, the court is still interpreting the meaning of the phrase, "change in interest," within the context of a maritime contract and pursuant to federal admiralty law.

The critical question is whether to apply the law of Louisiana or Florida. This question is answered only by determining what is the appropriate conflicts law to be applied. The nature of the issue to be resolved determines which conflicts rule governs. See *Siegelman* v. *Cunard White Star,* 221 F.2d 189 (2d 1955). Thus, in questions involving contract interpretation, admiralty conflicts law recognizes the principle of lex loci contractus; that is the law of the place where the contract is made. See *Valdesa Compania Naviera* v. *Frota National de Petroleiros,* 348 F.2d 33 (3d Cir. 1965); *Jansson* v. *Swedish American Line,* 185 F.2d 212 (1st Cir. 1950).

However, the court must determine when title to the tug MISS CAROLYN passed, which is not a matter of interpreting any provision of the contract. Under the laws of Florida, the mere execution of the contract of sale would be insufficient to effect a valid transfer of title in the vessel; under the laws of the state of Louisiana the execution of the contract of sale would be sufficient to transfer title instanter. In determining a question concerning the validity and effect of a transfer of title in personalty, the universally recognized conflicts law is that of lex rei sitae or the law of the place of the situs of the personalty. See

U. S. v. *Guaranty Trust Co.*, 293 U.S. 340, 55 S.Ct. 221, 79 L.Ed. 415 (1934); *Frick* v. *Commonwealth of Pennsylvania*, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058 (1925). As stated by Mr. Justice Story in his work on Conflicts of Laws:

> A nation within whose territory any personal property is actually situate has an entire dominion over it while therein. . . . It may regulate its transfer . . . to the same extent that it may exert its authority over immovable property. Story, *Conflicts of Laws*, § 550, cited in *Frick* v. *Commonwealth of Pennsylvania*, supra, 268 U.S. at 493, 45 S.Ct. at 606, 69 L.Ed. at 1064.

There is no dispute that at the time of the execution of the contract of sale and subsequent thereto the tug MISS CAROLYN was situated in the State of Florida. She was sent into the State of Florida voluntarily by East West. Her presence within the State of Florida was far from transitory since the purchaser and current owner of the tug MISS CAROLYN E. & I. is a Florida corporation.

Prior to the time the contract of sale was executed, the tug MISS CAROLYN was actually situated in the State of Louisiana, since Louisiana was the state of enrollment, the state in which the tug was berthed when not used, the state in which its crew resided and the state of its owner's place of incorporation. Such factors have been considered in determining which states acquire the right to tax personal property such as vessels and rolling stock which move from state to state on a transitory basis in fulfilling the very purpose for which they were created. See, e.g., *City Bank Farmers Trust Co.* v. *Schnader*, 293 U.S. 112, 55 S.Ct. 29, 79 L.Ed. 228 (1934); *Johnson Oil Co.* v. *State of Oklahoma*, 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238 (1933); *Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96 (1911).

If the transfer of title to the tug MISS CAROLYN was between two Louisiana residents and the tug remained in

Louisiana when not engaged in towing, the law of another state should not govern the question of transfer of title simply because the tug was temporarily outside the state while engaged in a tow. However, in this case, the tug MISS CAROLYN was not temporarily outside the State of Louisiana. Since the tug was situated in Florida at the time the contract of sale was executed and remained in the State of Florida after the execution, it is appropriate that, in accordance with the principle of lex rei sitae, the law of the State of Florida should apply. As between the two states, Florida, the domicile of the purchaser and the state in which the tug was situated at the time of the execution of the contract, has the greater interest in having its law applied to a question concerning transfer of title. In addition, application of the law of Florida makes even greater sense since its law is the uniform law of forty-eight other states, the District of Columbia and the Virgin Islands. While it does not appear that interest analysis has been utilized in admiralty conflicts analysis, interest analysis buttresses this court's determination that the law of the state of Florida is the applicable law.

Although the parties did not stipulate that the law of Florida would apply to the transfer, it is clear that the parties intended that the title to the vessel would not pass nor would the contract of sale become final until the tug was delivered to the representative from E. & I. in Tampa. Thus, the intention of the parties conforms to the result obtained by applying Florida law.

Alternatively, even if the court were required to apply the law of Louisiana, the court finds that the arrangement of the parties whereby the tug MISS CAROLYN was to complete its undertaking of towing the barge to Tampa and where E. & I. was to assume no part in the tow of the barge because of its lack of collision insurance was a suspensive condition of the sale of the tug. Even under Louisi-

ana law, there is no contract of sale without mutual assent. *Big "A" Sand & Gravel* v. *Bay Sand & Gravel,* supra.

Therefore since delivery of the tug is a condition precedent to the sale of the tug under the laws of the State of Florida which the court finds is the appropriate law to apply and since completion of the tow of the barge LOVELAND 34 into Tampa was a suspensive condition of the sale under the laws of Louisiana and according to the mutual intention of the parties, the court finds as a matter of law that transfer of ownership of the tug MISS CAROLYN from East West to E. & I. did not occur until the afternoon of August 18, 1973 when the tug was delivered to the Nilo Docks where the crew from E. & T. [sic] was awaiting its arrival.

Since the negligent acts for which MISS CAROLYN is responsible occurred at the time she anchored the barge LOVELAND 34 in Tampa Bay, which is prior to the time that a change in management and ownership occurred, the court finds that the underwriters are liable under their policy of insurance issued on the tug MISS CAROLYN.

The court further finds that there was written assent to the change of ownership by virtue of Endorsements No. 26 and No. 27 issued on Policy No. GSD1100, which deleted the tug MISS CAROLYN from the policy of insurance effective August 25, 1973 after the collision occurred and after ownership had changed and with full knowledge of these events. The policy provision does not require that the assent be prior to the change in ownership or management.

Thus plaintiffs' policy of insurance was in full force and effect at the time of the negligent acts of the tug MISS CAROLYN and the plaintiffs are therefore liable to respond for the damages recovered against its insured, East West Towing and the tug MISS CAROLYN in Case No. FL 73–43–Civ–NCR and Case No. FL 73–61–Civ–NCR.

Amended final judgment to issue in accordance with this opinion.

APPENDIX D

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. .....

ST. PAUL MERCURY INSURANCE COMPANY,
INDEMNITY MARINE ASSURANCE CO., LTD.,
AND AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioners,

VS.

EAST WEST TOWING, INC., ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Theodore George Dimitry, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed by United States mail, properly addressed and postage prepaid, to Christian D. Keedy, Esq., Smathers & Thompson, 1301 Alfred I. DuPont Building, Miami, Florida 33131; Ronald FitzGerald, Esq., Fleming, O'Bryan & Fleming, American National Bank Building, 1415 East Sunrise Blvd., Fort Lauderdale, Florida 33304; Alan Deserio, Esq., State of Florida, Department of Transportation, Haydon Burns Building, Tallahassee, Florida 32303; William L. Von Hoene, Esq., 1216 International

Trade Mart, 2 Canal Street, New Orleans, Louisiana 70130; and Dewey R. Villareal, Jr., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P. O. Box 1438, Tampa, Florida 33601, on this .... day of ....., 1980. I further certify that all parties required to be served have been served.

.....

THEODORE GEORGE DIMITRY,
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2296

Counsel for Petitioners